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ABSTRACT

Based on a review of the briefs filed with the U. S. Supreme Court in the Bakke case, the principal arguments addressed to the Court, possible dispositions of the case, and implications for the educational community are addressed. Bakke's claim is that he had been denied the equal protection of the laws in that applicants of lesser objective qualifications had been admitted in the University of California (Davis) Medical School because of their race. The decision of the California Supreme Court and the admissions process at Davis are outlined. Among the points significant to the future of minority participation in higher education on which there is substantial agreement are the following: it is justifiable to take special steps in an effort to enlarge the proportion of minority students attending medical schools and other segments of higher education; the medical school at Davis has never practiced discrimination; in the absence of special admissions programs, the number and proportion of minority students in higher education would decline sharply; tests and grades do not predict success or failure but only probabilities; and applicants need not be taken in rank order of performance in terms of grades and test scores. The basic questions in the case is whether race can be taken into consideration in admissions decisions at a public institution, when done for valid social purposes. Bakke and his supporters insist that the Davis medical school has a quota system for admissions. The University's position is that there is no quota system, and that the medical school does not admit unqualified applicants in order to insure that each entering class contains a particular number of minorities. The positions of several professional associations and the U. S. government regarding special admissions programs to professional schools are outlined. (SW)

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REVIEW OF ISSUES RAISED IN BRIEFS FILED
WITH THE SUPREME COURT OF THE UNITED STATES IN
REGENTS OF THE UNIVERSITY OF CALIFORNIA (DAVIS) v. BAKKE

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REVIEW OF ISSUES RAISED IN BRIEFS FILED
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Regents of the University of California (Davis) v. Bakke

Based on a review of the briefs filed with the Supreme Court of the United States in the Bakke case, this memorandum seeks to explain the principal arguments addressed to the Court, anticipates possible dispositions of the case, and explores the implications for the educational community. It is addressed to those educators, administrators and lawyers whose job will begin when the Bakke case ends.

We have had access to 39 briefs filed on behalf of the petitioner, the Regents of the University of California; 15 briefs filed on behalf of the respondent, Allan Bakke; and the brief filed on behalf of the United States. We are advised this is the largest number of briefs ever filed with the Supreme Court in a single case.

I. Statement of the Case

Allan Bakke graduated from the University of Minnesota in 1962 with a Bachelor of Science degree in mechanical engineering. He did graduate work in mechanical engineering at the University of Minnesota for a year and then served four years in the U.S. Marine Corps. After completing his military service he attended Stanford University and received the Master of Science degree in mechanical engineering in 1970. During that time and subsequently he completed the courses that are prerequisites to a medical education.

In 1972 Bakke applied for admission to two medical schools and the next year to 11 more. All 13 turned him down. In 1974 he applied for a second time at the University of California at Davis and was again rejected despite the fact that his undergraduate grade point average (GPA) and his scores on the Medical College Admissions Tests (MCAT) were higher than most or all of the 16 minority applicants who were accepted

from the Task Force Program in which race was a factor in the admissions decision.¹

The Admissions Process at Davis. The medical school of the University of California at Davis opened in 1968 with 50 students; there were three Asians, no blacks, no Chicanos and no native Americans.

In the next two years the medical school faculty developed a special admissions Task Force Program intended to compensate for the effects of societal discrimination on historically disadvantaged racial and ethnic minorities.

Applicants to the medical school at Davis could apply under the general admissions procedure or under the Task Force Program. In practice, only disadvantaged members of racial and ethnic minority groups are admitted under the Task Force program. The materials submitted by minority applicants are screened to determine if those applicants are disadvantaged, and those who are not found to be disadvantaged are referred to the general admissions process.² Both groups are further screened to eliminate all who fail to meet minimum standards and to select some of those remaining for interview. The final selection process is made on the basis of an elaborate point scoring system that includes MCAT, GPA, recommendations and interview ratings.

Allan Bakke was screened through the general admissions procedure; he was interviewed and scored well, but was not admitted. In suing, his claim was that he had been denied the equal protection of the laws in that applicants of lesser objective qualifications had been admitted because of their race. He also claimed a violation of the 1964 Civil Rights Act, 42 U.S.C. §§2000a et seq., prohibiting discrimination on grounds of race, color, religion, or national origin by any state or its agents.

The Decision of the California Supreme Court. Bakke's contention was upheld by the trial court on both the constitutional and statutory grounds. However, it refused to order his admission because he had not met the burden of proving that he actually would have been admitted in the absence of the Task Force Program.

1

Only 15 of these minority applicants actually enrolled. When one withdrew before registration, a nonminority applicant was selected to fill that place.

2

In 1974 four Chicanos, five Asians and no blacks were admitted through the general admission procedure. The Task Force Program admitted six blacks, seven Chicanos and two Asians.

The California Supreme Court, taking the case directly from the trial court, held the challenged program unconstitutional "because it violates the rights guaranteed to the majority by the equal protection clause of the Fourteenth Amendment of the United States Constitution." Conceding, arguendo, that the objectives of the Task Force Program were not only proper but compelling, the court suggested that those objectives might be accomplished in other ways. The court suggested that increasing the number of medical schools (or the size of their student body), aggressive recruiting, or exclusive reliance on disadvantaged backgrounds without regard to race, would somehow achieve racial diversity without giving any weight to race.

The court also held that the trial court was in error in imposing on Bakke the burden of establishing that he would have been admitted had there been no special program. When the burden was shifted to the University to establish that Bakke would not have been admitted in any event, the University conceded that it could not sustain that burden. The court then modified its original order to direct that Bakke be admitted.

The Supreme Court of the United States granted the University's petition for certiorari on February 22, 1977. Briefs were exchanged during the summer, and the case was set for argument on October 12, 1977. A decision can be expected before the Supreme Court recesses in late spring or early summer of 1978.

II. Points of Agreement

Despite the sharp constitutional clash between the opposing parties, there are several points significant to the future of minority participation in higher education on which there is substantial agreement.

A. The reason the issue is so strongly contested is best understood in terms of the importance of higher education in contemporary America. The colleges, graduate schools and professional schools are the gatekeepers to success as measured in the world of today. An individual who is denied admission to the school of his choice feels, with some justification, that an opportunity for advancement - upward mobility we call it - has been foreclosed. Accordingly, when places in the most sought-after schools or departments are made unavailable, either because of preference to members of another group or because the admission standards seem out of reach, feelings run high.

B. Racial and ethnic minority groups are seriously underrepresented in all of higher education, in the professions, and generally in positions of power and influence, in comparison to their proportion of the total population. For example, black lawyers and doctors comprise only about 2 per cent of the total lawyer and doctor population, while blacks constitute about 12 per cent of the total population. The situation of Chicanos, American Indians and Puerto Ricans is worse.

Although no one suggests that the ratios must be made even for all - or any - groups in the society, there is general agreement that the present imbalance as to the principal racial and ethnic minorities in the United States, as above identified, is undesirably (some say unacceptably) large. In recognition of this fact the California Supreme Court noted, arguendo, that the state has a compelling interest in increasing the representation of minority groups in its medical schools, and by inference in all of higher education when the imbalance is serious. Accordingly, it is justifiable to take special steps in an effort to enlarge the proportion of minority students in attendance. The disagreement, to be noted below, involves the question of what steps are constitutionally valid and which, if any, are likely to succeed in bringing more minority students into higher education.

C. The fact of race or ethnic background has been a traditional source of discrimination in the United States and has been particularly virulent in the case of blacks, Chicanos, Native Americans and Puerto Ricans. In California racial segregation in the public schools was not forbidden by state law until 1947; and even since that time a number of school districts have been held by federal and state courts to be guilty of continuing discrimination. The young medical school at Davis, however, has never practiced discrimination. Indeed, since 1970 it has sought to make up for previous discrimination and disadvantage elsewhere by giving preference to blacks, Chicanos and Asians (the three principal minority groups in the area) who are found to have been disadvantaged.

D. In the absence of special admissions programs the number and proportion of minority students in higher education would decline sharply. While there is disagreement as to how precipitous would be the reduction in numbers, no one denies that it would happen to some extent. That is what the case is all about, as will be discussed below. It appears probable that none of the 15 minority students who were admitted to the medical school at Davis in 1974 would have been accepted if there had been no Task Force Program.

E. The admissions process is at best imperfect. Ways have not been found to test for motivation, industry and the various personal and emotional factors that affect performance in fact as compared with performance in tests. However, it is not to be doubted that aptitude tests and high school or college grades provide some basis for predicting success or failure at the level of higher education to which the tests or grades are relevant. The simple, indisputable fact is that the various standard tests - SAT, MCAT, LSAT, and GRE, among others - offer the most reliable predictors of future academic performance now available, when combined with grade point averages. They predict with approximately equal reliability as to majority and minority groups.

It is important to remember, however, what the tests and grades do not purport to do. They do not attempt to predict ultimate success or failure in the practice of medicine or law or business, or life in general. Moreover, they do not predict success or failure in fact of any single applicant, but only probabilities.

Institutions with many more applicants than they can accept (the ratio of applicants to places in the Davis medical school class in 1974 was 37 to 1) almost invariably use tests and grades to reject those applicants who are judged on that basis to be unlikely to complete the academic program successfully. The more refined selection process for those not eliminated takes into account the relatively objective grades and test scores along with more subjective factors such as interviews, letters of recommendation, and "disadvantage" that might have depressed earlier performance.

F. Applicants for admission to an institution of higher education need not be taken in rank order of performance of the so-called objective factors of GPA and test scores. Indeed, probably no school does so. Presumably, every school makes some or many of its admissions decisions on the basis of interviews, recommendations, or intuition. Certainly, Davis applied such criteria in both its general admissions and in its Task Force Programs. Many institutions give preference on the basis of geography, favoring those in-state (or from a particular region of the state, as in the case of Davis) or those from a distance. And it is not unknown for preference to be given to sons or daughters of faculty members, alumni, legislators, donors or other "friends" of the institution. The Supreme Court of California conceded that the University was not required "to utilize 'only the highest objective credentials' as the criteria for admission." The short of it is that no one asserts a constitutional barrier to some kinds of preference, even those which exclude other applicants who would otherwise have been admitted - except where race

is a factor in the decision. That of course is the central issue in the case.

G. Finally, although this is a medical school case, no one should be misled into believing that the Supreme Court decision will affect only medical schools, or only professional schools. The decision will have a profound impact on all institutions of higher education in which there are substantially more applicants than places and where an effort has been made to enlarge the number of minority registrants by giving some kind of preference to such applicants. And that is a description of nearly every school and department of nearly every institution of higher learning in the United States. Special admissions programs, with varying preferences and with varying degrees of forthrightness about their practices, are very much a part of higher education in the United States today. Accordingly, the decision of the Supreme Court will profoundly affect the course of higher education, the access of minorities to the mainstream of the affluent life, and the social balance of the nation. It is not too strong to say, and all parties surely agree, that the Bakke case raises the most important issue for higher education that has ever come before the Supreme Court of the United States.

III. The Issue

Important constitutional cases ordinarily involve complex facts or intricate constitutional issues. Often there is even dispute among the parties as to what is the issue. Almost uniquely, the Bakke case raises a single, readily definable issue as to which there is no substantial disagreement. Here is the way the issue is framed by the parties:

On behalf of Bakke:

Is Allan Bakke denied the equal protection of the laws in contravention of the Fourteenth Amendment to the United States Constitution when he is excluded from a state operated medical school solely because of a racial quota admission policy which guarantees the admission of a fixed number of "minority" persons who are judged apart from and permitted to meet lower standards of admission than Bakke?

On behalf of the University:

When only a small fraction of thousands of applicants can be admitted, does the Equal Protection Clause forbid a state university professional school from voluntarily seeking to counteract effects of generations of pervasive discrimination against discrete and insular majorities by establishing a limited special admission program that increases opportunities for well-qualified members of such racial and ethnic minorities?

True, the first statement of the issue emphasized the deprivation of Bakke as an individual, while the second suggests the desire to overcome past discrimination against a group. But there is no essential difference. Baldly put, the question is whether race or ethnic background can be taken into account in making admissions decisions in a public institution. The California Supreme Court said no, ruling that admissions decisions must be racially neutral. The large but narrow question is: Can or should that ruling become the law of the land?

IV. Points of Disagreement

A. The basic question, as just noted, is whether race can be taken into consideration in admissions decisions at a public institution, when done for a valid social purpose. That issue overrides the facts of the Bakke case, but it is to be decided, after all, in the factual context of this case. It was earlier suggested that there are no important factual disputes in the case, and that is true. There is, however, a disagreement about the interpretation to be placed on the agreed-upon facts. Did the medical school at Davis have a "quota" for minority applicants, or was it a "goal"?

Bakke and his supporters insist that it was a quota system. The argument is that 16 places in the medical school class were closed to Bakke and other white applicants because reserved for minority applicants, thus amounting to a two-track admission system. Had 100 places been equally open to all applicants, they assert, Bakke would have been admitted; and the University conceded that it could not establish that he would not have been admitted if there had been no special program.

The University responds that there was no quota system at Davis. The word "quota" should be reserved, in their judgment, for

the devices previously used by a dominant group to exclude more than a limited number of specified groups (sometimes on religious, ethnic, sex, or racial grounds). The University's brief continues:

Obviously that is not true in the instant case. Today, the label quota might signify a floor, a ceiling, or both. None of these attributes appears in the Davis program, and it is misleading to use the term quota with regard to that program. The Davis program sets a goal, not a quota. There is no floor below which minority presence is not permitted to fall. The medical school does not admit unqualified applicants in order to insure that each entering class contains a particular number of minorities.

Similarly, the American Bar Association brief amicus denies the existence of a quota - "Indeed the ABA does not support the use of quotas in admissions programs." The Task Force Program, according to the ABA, simply fixes a goal which "sets neither a maximum nor a minimum for minority students [and therefore] does not constitute a quota."

The "quota/goal" issue may be more semantically distracting than real, although certainly it is an issue of highly charged emotional content. So long as only qualified applicants are accepted (which is not denied), it may make no very important difference whether the best qualified 16 minority applicants are accepted pursuant to a quota or whether the same 16 are accepted pursuant to a goal. The central, inescapable fact remains: A not inconsiderable number of minority applicants were given special consideration without which many or all would not have been admitted to medical school.

B. The Supreme Court of California, acknowledging the importance of attracting minority registrants to medical schools (and presumably other institutions of higher education), held that such applicants must be attracted and admitted on bases that do not take race into account. The court suggested increased minority recruitment, enlarged numbers of places in medical schools, and reliance on non-racial factors of social disadvantage.

These suggestions are repeated in briefs filed in behalf of Bakke, but without explicit indication of what the effect of such efforts would be. On the other hand, the brief for the University and others filed in its behalf offer evidence that none of these suggestions is workable. The briefs of the Association of American Medical Schools,

the Association of American Law Schools, the Law School Admission Council, and the National Fund for Minority Engineering Students, among others, argued that if race could not be made a factor in the admissions process, the number of minority students in medical schools, law schools and engineering schools would decline precipitously. The arguments and evidence as to law schools, perhaps the most fully developed, can be summarized as follows:

1. Recruitment of minority students has been extensive; it is unlikely that even further efforts would produce more than a very few qualified candidates.

2. Drawing upon data in a recent Law School Admission Council Report, evidence was presented to show that if race had not been a factor in 1976 admissions decisions, black and Chicano registration in approved law schools would have been no more than 2.3% of the total and "more likely, no more than about 1%." In fact, those two categories alone amounted to 6.2% of the 1976 new admissions (and even that is unfavorable compared to the 14% of the total population consisting of blacks and Chicanos).

3. The suggestion that admissions be based in part on preference for the economically disadvantaged was also asserted to be unworkable. In rejecting this as a possible means of increasing minority representation, the Association of American Law Schools brief concluded as follows:

The best data now available as to the probable composition of any such disadvantaged special admissions program suggest that, among the present pool of applicants, over 90% of those who would be admitted under such a program would be neither black nor Chicano. And even this necessarily understates the problem. However schools advertise their special admissions programs, it is understood that these programs are essentially limited to members of minority groups. But once it is learned that an applicant of any race possessing academic credentials substantially lower than those ordinarily required for admission can gain admission if the applicant shows economic disadvantage, it can be predicted with certainty that two things will happen: (i) there will be a substantial number of unverified and unverifiable claims of childhood economic disadvantage and (ii) there will be a large number of potential applicants who now do not apply who will seek to take advantage of the program.

In sum, it is the contention of the supporters of special admissions programs that, at least for the present, there is no way of maintaining a substantial minority presence in selective institutions unless race or ethnic background is allowed to be taken into account.

C. The opposing parties differ sharply on the constitutionality of using race as a factor in admissions. The Bakke supporters argue that he was excluded from medical school because he was white. Here is the argument of the Anti-Defamation League of B'nai B'rith and others.

Had he been a nonwhite he would not have been excluded.
Had he been a nonwhite, he could not have been excluded.
Sweatt v. Painter, 339 U.S. 629 (1950)

Thus, to grant privileges to nonwhites but to deny them to whites is an invalid denial of equal treatment under the law. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

Arguing that Bakke was denied admission because of the "quota" for minority applicants, the Bakke supporters contend that all quotas are intrinsically malign "with regard to the individual who is deprived of benefits he would have had were he only of the preferred group." Moreover, even the person who is preferred "will bear the stigma of one who could not 'make it' under standards applicable to his fellow students."

Arguments in behalf of the University begin with the proposition that minority preferences are necessary to promote the "compelling state interest" (Cipriano v. City of Houma, 395 U.S. 701 (1969); Dunn v. Blumstein, 405 U.S. 330 (1972); In re Griffiths, 413 U.S. 717 (1973) of bringing minority students into the mainstream of American life for which higher education is essential. It is important to have diversity in the classrooms and in the professions and to provide role models for the next generation of minority individuals.

To satisfy these needs requires the use of race as a factor, but that is said not to be forbidden by the Constitution. In several cases the Supreme Court has recognized the appropriateness of taking race into account. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); Washington v. Davis, 426 U.S. 229 (1976); United Jewish Organizations of Williamsburgh v. Carey, 97 S. Ct. 996 (1977); and Califano v. Webster, 97 S. Ct. 1192 (1977).

V. The Intervention of the United States

The briefs in support of the petitioner (the University) were due in early June 1977 and those in support of the respondent (Bakke) were due in early July 1977. The Department of Justice, representing the United States, remained undecided whether to file in the case, and, if so what position to take, until mid-September, when it received special permission to file late.

After much discussion in the press about possible positions (and apparently considerable infighting) the brief, signed by Attorney General Griffin Bell, Solicitor General Wade McCree, and Assistant Attorney General (Civil Rights Division) Drew Days, took an "in between" position. That is, the United States argued that, in order to achieve equal opportunity and prevent racial discrimination

both goals can be attained by the use of properly designed minority-sensitive programs that help to overcome the effects of years of discrimination against certain racial and ethnic minorities in America.

In reaching that conclusion the brief noted that both Congress and the Executive Branch have adopted numerous "minority-sensitive" programs to benefit persons disadvantaged on account of race. Popularly known as "affirmative action" programs (and enumerated in an appendix to the brief), these legislative and executive programs would be jeopardized by a Supreme Court decision that cast doubt on the permissibility of considering race.

Nevertheless, the United States brief does not take a position on the particular program at Davis. Concluding that the record is deficient to show how race was used in the Task Force Program (with an inference that some uses would be unconstitutional) the brief recommends that the judgment of the Supreme Court of California "be vacated for further proceedings consistent with the views we have discussed." That is, further evidence should be taken by the California courts to determine whether race was used in an impermissible fashion.

VI. Possible Decisions

The Supreme Court of the United States could decide the Bakke case in three basic ways (of course with a number of variations as to each).

A. The decision of the California Supreme Court could be affirmed, meaning that race could not be used as a factor in admissions decisions in public schools. Very likely, this would mean that so-called private schools would be similarly disabled, either because of the public money received by virtually all institutions of higher education or because of the pragmatic difficulty of applying standards radically different from those of public institutions.

It seems highly unlikely that the Court will flatly and completely forbid the use of race as a factor. However, there is considerable doubt as to how extensive will be the grant of authority to take race into account.

B. The decision of the California Supreme Court could be reversed with a specific affirmation of the constitutional validity of the Davis Taks Force Program. If the Supreme Court should take this course, it would be likely to follow the lead of the University and ABA briefs to find that Davis did not apply a "quota" system. It seems unlikely that the Court will approve something called a quota.

C. Finally, and perhaps now the most likely result, the Court could follow the advice of the United States brief, concluding that race may permissibly be taken into account, but leaving for another day the final determination of the validity or not of the particular program. This would mean further litigation about this and other programs, but would allow breathing space for further consideration of the complex social issues.

Robert B. McKay

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